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Supreme Court, U.S.

FILED

MAY 2 1997

CLERK

No. 96-643

IN THE
**Supreme Court Of The
United States**
OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL
AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

**BRIEF OF AMERICAN FOREST & PAPER
ASSOCIATION, INC. AND THE NATIONAL
ASSOCIATION OF MANUFACTURERS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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May 2, 1997

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CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amicus curiae American Forest & Paper
Association, Inc.¹ is a non-profit trade association for

¹ Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court. Additionally, pursuant to Rule 37, this brief was authored, prepared and paid for in its entirety by the *amici*.

over 250 member companies engaged in growing, harvesting, and processing wood and wood fiber and manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber, and solid wood products. Its member companies account for over 8 percent of the total U.S. manufacturing output. *Amicus curiae* the National Association of Manufacturers is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the National Association of Manufacturers through its Associations Council and National Industrial Council.

The *amici* represent companies which use certain chemicals in their manufacturing processes that are subject to the reporting requirements of sections 312 and 313 of EPCRA. Section 326 of EPCRA authorizes private citizens to sue alleged violators for violations of four specific reporting requirements, including failure to "complete and submit an inventory form" under section 312 and failure to "complete and submit a toxic chemical release form" under section 313.²

² Section 312 generally requires submittal of "hazardous chemical" inventory forms to the state emergency response commission, the local fire department, and the appropriate local emergency planning committee. 40 C.F.R. § 370.25 (1996). Section 313 requires submittal of "toxic chemical" release forms, also known as "Form R" reports, to EPA and to the state emergency response commission for any of the 651 specified chemicals. A separate Form R must be filed for each chemical released to the environment (as defined in EPCRA § 329(2)), 42

If this court affirms the Seventh Circuit's decision and, by implication, rejects the Sixth Circuit's reading of the same statutory language,³ a new right to seek civil penalties for wholly past, corrected EPCRA violations will be grafted onto the statute. *Amici's* member companies that have been using their best efforts to comply with EPCRA could be vulnerable to citizen suits for good-faith reporting errors that EPA does not feel warrant punishment.

As representatives of a large segment of U.S. industry, the *amici* can help provide this Court with a broader perspective on the practical realities of EPCRA compliance and enforcement and the pernicious effects that the Seventh Circuit's decision could have.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision is contrary to the plain meaning of EPCRA section 326 and it fails to accurately analyze the Act's legislative history. Moreover, the Seventh Circuit's opinion renders the mandated 60-day prior notice provision gratuitous, and its assertion that such notice is nonetheless effective is without support in the statute, legislative history, or common practice. Lastly, there are over-riding public

U.S.C. § 11049(2)) that exceeds the applicable threshold quantities. 40 C.F.R. § 372.30 (1996). The chemical release information is compiled by EPA into the Toxic Release Inventory or the TRI.

³ *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995).

policy reasons behind Congress' affording EPA the authority to enforce violations of "any requirement" of EPCRA sections 312 and 313 and its failure to provide the same power to citizen groups. Under the Seventh Circuit's reading of section 326, citizen group lawyers would be given a perverse incentive to pursue EPCRA citizen suits to the detriment of the intent of the statute, which is to ensure that toxic chemical release data are collected and released to EPA, the applicable state and local entities, and the public for emergency planning and response purposes.

ARGUMENT

I. THE SEVENTH CIRCUIT'S READING OF EPCRA SECTION 326 IS CONTRARY TO ITS PLAIN MEANING AND THE RELEVANT LEGISLATIVE HISTORY

A. Like Other Citizen Suit Provisions, EPCRA's Citizen Suit Provisions Are Generally Cast in the Present Tense

The Seventh Circuit asserts that the EPCRA provisions are not "cast in the present tense" and it places great weight on this point. *Citizens for a Better Environment v. The Steel Company*, 90 F.3d 1237, 1244 (7th Cir. 1996) (reproduced at Pet. App. 1A-15A). The Seventh Circuit concludes that the statutory language permitting citizens to sue for failure to "complete and submit" the requisite forms under sections 312 and 313 can indicate either a failure in the past or present. It then goes on to look at the EPCRA citizen suit provision as a whole, and determines that use of the word "occurred" in the section 326(b) venue provision is evidence that Congress intended that an EPCRA citizen suit could reach historical violations. *The Steel Company*, 90 F.3d at 1244, Pet. App. at

A13. Strangely, the Seventh Circuit accords no weight to the use of the present tense in the section 326(d) notice provision, *i.e.*, notice must be given to the "State in which the alleged violation occurs." 42 U.S.C. § 11046(d). This Court, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1987), cited the exact same notice provision language under section 505(b) of the Clean Water Act as an example of the forward-looking nature of that citizen suit provision. While the past tense is used in the venue section of EPCRA, this is not surprising since the citizen suit provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Solid Waste Disposal Act ("SWDA"), and the Toxic Substances Control Act ("TSCA") each incorporate the same venue provision.⁴ Courts interpreting the scope of CERCLA, SWDA, and TSCA citizen suits have concluded that jurisdiction exists only for ongoing violations.⁵

⁴ CERCLA § 310(b)(1), 42 U.S.C. § 9659(b)(1); SWDA § 7002(a), 42 U.S.C. § 6972(a); TSCA § 20(a), 15 U.S.C. § 2619(a).

⁵ See, *e.g.*, *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (CERCLA citizen suit requires allegations of continuous or intermittent violations); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 420-422 (M.D. Pa. 1989) (same); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993) (same for RCRA); *Moreco Energy, Inc. v. Penberthy-Houdaille*, 682 F. Supp. 931, 932 (N.D. Ill. 1987) (same for TSCA).

B. The EPCRA Citizen Suit Venue Provision Mirrors the CERCLA Language that Was Enacted as Part of the Same Legislation

The CERCLA citizen suit provision was enacted as part of the same legislation as EPCRA — the Superfund Amendments and Reauthorization Act of 1986 ("SARA" or "1986 Superfund Amendments").⁶ SARA used virtually the same venue language that the Seventh Circuit relied so heavily on, *i.e.*, "[a]ny action under . . . this section shall be brought in the district court for the district in which the alleged violation occurred," for both the CERCLA and the EPCRA citizen suit provisions. CERCLA § 310(b), 42 U.S.C. § 9659(b) and EPCRA § 326(b), 42 U.S.C. § 11046(b). This Court has recognized that it is a common canon of statutory construction that "language used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993).

Although the legislative history of the EPCRA citizen suit provision is sparse, the legislative history of the 1986 Superfund Amendments, of which EPCRA was a part, includes considerable discussion on the citizen suit provision that was added to CERCLA. In the Senate Committee on Environment and Public Works Report on S. 51, the Superfund Improvement Act of 1985, the Committee stated that:

A citizen suit provision has been a standard feature of each of the major environmental laws since the 1970's.

⁶ EPCRA was enacted as Title III of the 1986 Superfund Amendments.

The reported bill adds such a provision to the Superfund law. Under this new authority, modeled on the citizen suit provisions of the Clean Air, Clean Water and Solid Waste Disposal Acts, individuals may bring actions in Federal court against private parties . . .

S. Rep. No. 99-11, at 62 (1985).⁷ Thus, since the other citizen suit provisions have been held by this Court and others not to authorize citizen suits for wholly past violations (*see Gwaltney*, 484 U.S. at 56-63 and note 5 *supra*), and Congress modeled the CERCLA citizen suit provisions on those other statutes, there is no reason to believe Congress intended CERCLA to authorize citizen suits for wholly past violations, and courts have concurred, (*see, e.g., Coalition for Health Concern*, 60 F.3d at 1193; *Lutz*, 718 F. Supp. At 420-422), despite the fact that the CERCLA venue provision uses the past tense ("occurred").

⁷ Similar statements were made during the floor debate on the House of Representatives' bill H.R. 2817, the Superfund Amendments of 1985, and the relevant House Committee Reports on the legislation. *See, e.g.*, 131 Cong. Rec. H11,087 (daily ed. December 5, 1985) (statement of Rep. Glickman providing the House Judiciary Committee's Explanation of Purpose and Intent of section 113 of H.R. 2817 (noting the similarity between certain CERCLA citizen suit provisions with those of SWDA, TSCA, the Clean Air Act, and the Safe Drinking Water Act)); H. Rep. No. 99-253(III), at 33-34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3056-3057; and H. Rep. No. 99-253(V), at 83, *reprinted in* 1986 U.S.C.C.A.N. 3124, 3206 (in explaining CERCLA's citizen suit provisions, references made to similar provisions in the Clean Water Act).

Given that the EPCRA citizen suit provision was enacted as part of the same legislation as the CERCLA citizen suit provision, it seems unlikely that Congress would have intended the venue provision in EPCRA to mean something different from the venue provision in CERCLA. It also seems unlikely that Congress intended to depart from precedent in other environmental statutes and in CERCLA, to allow EPCRA citizen suits to seek civil penalties for wholly past violations, without even some cursory discussion in the final Joint House-Senate Conference Report accompanying the final version of the 1986 Superfund Amendments.⁸

C. The Seventh Circuit's Interpretation Distorts the Statute's Plain Meaning and Treads on EPA's Enforcement Authority

The phrase "failure to . . . complete and submit" the applicable forms "under" sections 312 and 313 should also be given its plain meaning. The Seventh Circuit makes the assumption that "under" means "in accordance with the requirements of" those sections. *The Steel Company*, 90 F.3d at 1243, Pet. App. at A11. While on its face this broad interpretation of the term may not seem unreasonable, in practice it expands citizen suit authority into enforcement areas that Congress specifically reserved to EPA. Under EPCRA section 325(c)(1), EPA is authorized to seek civil or administrative penalties from any person "who violates any requirement of" EPCRA sections 312 and 313. 42 U.S.C. § 11045(c)(1). If Congress had intended to grant citizen groups the same expansive enforcement

⁸ See H.R. Conf. Rep. No. 99-962, at 309-310 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3402-03.

authority as EPA, it would have said so. As set out in EPA's EPCRA penalty policies, there is a laundry list of potential violations of sections 312 and 313, including numerous potential data quality errors such as failing to identify all appropriate categories of chemical use.⁹ Many of these data quality errors would seem to fall within the Seventh Circuit's interpretation that reports need to be submitted "in accordance with the requirements of" sections 312 and 313. *The Steel Company*, 90 F.3d at 1243, Pet. App. at A11. But, as noted by the Sixth Circuit in *United Musical*, "Congress limited citizen suits by emphasizing that it is the failure to submit the requisite forms that gives rise to a citizen action. Congress did not authorize citizen suits for other violations of § 11023." *United Musical*, 61 F.3d at 475.

II. THE SEVENTH CIRCUIT'S CONCLUSION THAT THE 60-DAY NOTICE REQUIREMENT IS NOT INCONSISTENT WITH ALLOWING SUITS FOR HISTORICAL VIOLATIONS TO GO FORWARD IS UNFOUNDED

Under EPCRA section 326(d), no citizen enforcement action may be brought until 60 days after notice of the violation has been provided to the alleged violator, EPA, and the state. The Seventh Circuit

⁹ See EPA's Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), August 10, 1992, 23 ELR 35,523 ("EPCRA § 313 Penalty Policy"). See also Final Penalty Policy for EPCRA Sections 302, 303, 304, 311, and 312 and for CERCLA Section 103, June 13, 1990. 20 ELR 35,261. ("EPCRA § 312 Penalty Policy").

claims that allowing citizens to sue after overdue EPCRA filings have already been made does not "render the notice provision gratuitous." *The Steel Company*, 90 F.3d at 1244, Pet. App. at A13. The Seventh Circuit rationalizes its position by arguing that the 60-day notice provided to the alleged violator will still (i) give the alleged violator a chance to correct the citizen's information if he or she is mistaken about a violation, (ii) limit the alleged violator's exposure for additional penalties because "each day of an EPCRA violation is a separate violation," and (iii) conserve resources by giving violators a chance to enter settlement discussions with the citizens or EPA. *The Steel Company*, 90 F.3d at 1244, Pet. App. at A14. The Seventh Circuit's analysis is perplexing because these assumptions have no basis in the statute, the relevant legislative history, or common practice.

**A. The Seventh Circuit's Decision
Neutralizes the Intent of Providing a
60-Day Notice**

One of the primary functions of the 60-day notice provision is to allow EPA to initiate an enforcement action. The statute provides that "no [citizen] action may be commenced" where EPA has commenced and is "diligently pursuing an administrative order or civil action" to enforce an applicable requirement. EPCRA § 326(e), 42 U.S.C. § 11046(e). This limitation is a standard component of the citizen suit provisions of the major environmental laws, and, as this Court noted in *Gwaltney*, it suggests that the citizen suit is "meant to supplement rather than supplant governmental action." *Gwaltney*, 484 U.S. at 60. Further, this very point was recognized in the legislative history of the CERCLA citizen suit provision which was enacted with the EPCRA

provisions as part of the 1986 Superfund Amendments.¹⁰

In *Gwaltney*, this Court concluded, that:

It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.

Id. Rather than paying appropriate deference to precedent, the Seventh Circuit contends that Congress' amendment of the Clean Air Act undercuts this Court's determination in *Gwaltney* that Congress intended the 60-day notice provision to allow an alleged violator to come into compliance. *The Steel Company*, 90 F.3d at 1244, Pet. App. at A13. First, the 1990 Clean Air Act Amendments purport to grant district courts jurisdiction only for a subset of past violations, *i.e.*, past "repeated" violations.¹¹ Second, the Seventh

¹⁰ In the debate on H.R. 2817, the Superfund Amendments of 1985, Congressman Glickman provided the House Judiciary Committee's summary of the enforcement provisions of the bill. The summary provided that: "[t]he basic concept is that the purpose of citizen suits is to augment, not duplicate, government enforcement efforts. Consequently, instances where EPA or a state is involved in good faith negotiations will be protected from the drain and disruption that might otherwise be created by citizen suits." 131 Cong. Rec. H11,087 (daily ed. December 5, 1985) (Statement of Rep. Glickman providing the House Judiciary Committee's Explanation of Purpose and Intent of section 113 of H.R. 2817).

¹¹ The scope of this jurisdiction appears to be limited to very narrow circumstances in order to satisfy Article III

Circuit loses sight of the fact that the intent of EPCRA is to make sure that chemical release data is reported to the EPA and the state emergency response commission so that it may be used in developing emergency response plans and made publicly available so that potentially affected citizens may be aware of the possible risks from chemical releases in their community. H.R. Conf. Rep. 99-962, at 218 (1986), *reprinted in* 1986 U.S.C.A.N.N. 3276, 3374. If EPCRA citizen suits may only go forward for "ongoing" violations, an alleged violator certainly has plenty of incentive to file its forms as quickly as possible, *i.e.*, before the 60-day notice period expires, in order to avoid a citizen suit. This reading of the statute comports with EPCRA's intent of making the chemical release data available to EPA and the public. The Seventh Circuit's interpretation, however, would take away most, if not all, of the motivation for speedy compliance with the EPCRA reporting requirements.¹²

standing requirements. Moreover, as pointed out by the Sixth Circuit in *United Musical*, this argument is "unpersuasive since one can argue with at least equal force that by amending the Clean Air Act, but failing also to amend EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed." *United Musical*, 61 F.3d at 477.

¹² If a violator is going to be sued anyway, it does not really matter whether it complies with EPCRA reporting requirements within the 60-day notice period or waits until after the suit is filed. The alleged violator will still incur legal fees to defend itself, and more importantly the filing of a new or revised report could potentially be used by the citizen plaintiff as an admission that the report was legally required to have been filed previously. Conversely, if the company is uncertain whether a report was required to be

B. The Seventh Circuit's Conclusion that the 60-Day Notice Provision Is Not Rendered Gratuitous Is Contrary to Common Practice

The 60-day notice period may allow an alleged violator to point out "mistakes" by the citizen group, but this is really a misnomer because EPCRA section 326 only authorizes citizen suits for failure to "complete and submit" inventory forms and reports and either the forms and reports were filed or they were not.¹³ The Seventh Circuit also assumes that a violator can "limit its exposure" by filing late reports earlier during the 60-day period. But EPCRA does not specifically state that failure to file a report on time is a continuous violation from the date the report is due. EPA, in its EPCRA § 313 Penalty Policy, generally treats the failure to file a Form R report as a one-time violation in instances where the report is over a year late.¹⁴ As a result, EPA would typically assess only a

filed, a properly interpreted 60-day notice requirement creates an incentive for the company to err on the side of over-reporting, furthering the congressional goal of greater access to information.

¹³ As noted in Section I.C of this brief, the Seventh Circuit's decision appears to broadly interpret the scope of violations for which EPCRA citizen suits may be filed. By "mistakes" the Seventh Circuit may have also meant data quality errors, erroneous estimates of the volume of releases to be reported, etc., that should rightly be left to EPA's expertise and enforcement discretion. *See* Section III.B *infra*.

¹⁴ *See* EPCRA § 313 Penalty Policy, *supra* note 9. For reports that are less than a year late, EPA usually assigns a

maximum penalty of \$25,000 for a report that has missed the filing deadline by a year or more.¹⁵ Moreover, the Ninth Circuit has held that failure to submit a required notice under the Clean Air Act prior to commencement of an asbestos removal did not constitute a "continuous" violation, but only a single "day of violation," which occurred on the day before the renovation was commenced. *U.S. v. Trident Seafoods Corporation*, 60 F.3d 556 (9th Cir. 1995). Neither the statute nor the applicable EPA regulations support the Seventh Circuit's assumption that "continuous" penalties may be assessed for each subsequent day from the initial failure to file on the specified due date.

The Seventh Circuit's assertion that resources are conserved by fostering the opportunity for settlement during the 60-day period misses the mark in two ways. First, it is not clear that the alleged violator would have much of an incentive to settle within the 60-day period, since settlement with the citizen group would still leave the company vulnerable to an EPA enforcement action. More importantly, as noted above, the intent of EPCRA is to promote submittal of the reports to make the information available to EPA and the public, not to promote settlement on

pro rata share (on a per day basis) of the penalty up to a maximum of \$25,000.

¹⁵ EPA provides similar discretion in its EPCRA § 312 Penalty Policy to assess one penalty for a failure to file a timely inventory form. Inventory forms filed after 30 days from the reporting deadline are viewed as warranting a "level 1" penalty which may result in a maximum amount of \$25,000 per violation. EPCRA § 312 Penalty Policy, 20 ELR at 35264-66.

unspecified grounds before a citizen suit is even filed. Nowhere in the statute or the legislative history is this peculiar type of "incentive" even mentioned. In contrast, in the context of EPA enforcement, settlement negotiations with the government are encouraged through the "diligent prosecution" bar to citizen suits.¹⁶

III. THERE ARE OVER-RIDING PUBLIC POLICY REASONS SUPPORTING CONGRESS' DECISION TO GIVE EPA BROAD EPCRA ENFORCEMENT AUTHORITY AND NOT AFFORD THE SAME AUTHORITY TO CITIZENS

A. The Intent of EPCRA Citizen Suits Is to Ensure Chemical Release Data Are Reported, Not to Provide a Bounty for the Lawyers Representing Citizen Groups

The Seventh Circuit's interpretation of section 326 to authorize EPCRA citizen suits for wholly past, corrected violations largely rests on the premise that to read it any other way would "render the citizen enforcement provision virtually meaningless." *The Steel Company*, 90 F.2d at 1244, Pet. App. at A14. This is not the case. As the Sixth Circuit explained, if a company completes and files the requisite reports before the 60-day notice period expires, the mere

¹⁶ In discussing the CERCLA citizen suit provision, the House Judiciary Committee stated that the diligent prosecution bar is "also necessary to avoid the confusion or termination of settlement negotiations because EPA, a State, or potentially responsible parties face citizen suit litigation relative to the matters under negotiation." 131 Cong. Rec. H11,087, *supra* note 10.

notice of a citizen suit will have accomplished EPCRA's statutory goal. *United Musical*, 61 F.3d at 477. (Of course, even a facility that files the required reports during the 60-day notice period will still be vulnerable to a potential EPA enforcement action for the late filing. It is then a decision for EPA to make on whether other exigent circumstances weigh against assessing a penalty.)¹⁷

The Seventh Circuit posits that if citizens cannot seek recovery for past violations, then they would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing chemical release data. *The Steel Company*, 90 F.3d at 1244, Pet. App. at A14. But even if they were permitted to sue for wholly past violations, citizen groups still would not have any financial incentive for bringing such suits. To the contrary, they are prohibited from receiving any direct compensation from a suit.¹⁸ Their "incentive" is the accomplishment

¹⁷ EPA has not been reluctant to bring enforcement actions against late filers and other violators of EPCRA's provisions. For example, in 1994, EPA issued 242 EPCRA administrative penalty orders and assessed over \$8.2 million in penalties. EPA Enforcement and Compliance Assurance Accomplishments Report, FY 1994, EPA 300-R-95-004, May 1995, p. 4-5. In 1995, EPA closed 202 civil and administrative EPCRA cases and assessed over \$4.4 million in EPCRA civil and administrative penalties and secured over \$8.7 million in equivalent value in supplemental environmental projects. EPA Enforcement and Compliance Assurance Accomplishments Report, FY 1995, EPA 300-R-96-006, July 1996, p. 3-3 to 3-4.

¹⁸ To the extent any civil penalties would be extracted in a settlement or court decision, these are required to go to

of encouraging and assuring compliance, a goal that is just as well (and much more quickly) realized if the violator promptly corrects the problem after receiving the 60-day notice. The injury the citizens face is not having access to the data that EPCRA requires to be reported. Allowing citizen suits for past failures to report violations that have been corrected does not advance this cause of greater access to information at all. Permitting a citizen suit to go forward after a violation has been corrected basically serves only one purpose -- to reward the citizen group's lawyers with attorney fees and other expenses. There is absolutely nothing in the statute or legislative history that discusses creating incentives for citizen group lawyers to pursue past violators of EPCRA's reporting requirements.¹⁹

the U.S. Treasury. EPCRA §§ 325(c) and 326(c), 42 U.S.C. §§ 11045(c) and 11046(c).

¹⁹ It also is worth noting that EPCRA citizen suits can be filed with relative ease. All the EPCRA filings are available publicly. Data from the section 313 Form R reports are available on the National Library of Medicine's TOXNET System and EPA's Internet ENVIROFACTS database. Hard copies of the section 312 inventory forms and section 313 Form R reports are available from EPA through the Freedom of Information Act (5 U.S.C. § 552 *et seq.*). An enterprising citizen group lawyer merely needs to access the ENVIROFACTS database, key in the name of the relevant facility, and almost instantly information on whether the facility has filed its Form R reports is available.

B. Congress Intended that EPA, Not Citizen Groups, Make the Difficult Determinations on Whether EPCRA Reports Comply with the Requirements and Whether Punishment Is Warranted

Congress authorized EPA to bring an enforcement action against any person "who violates any requirement" of EPCRA, while it carefully limits citizens to suing for "failure" to "complete and submit" four types of reports. EPCRA § 326(a), 42 U.S.C. § 11046(a). There are strong policy reasons Congress would leave the bulk of EPCRA enforcement to EPA. EPA is in a much better position than a private citizen to determine whether the rules apply, whether a report is accurate, and when a transgression of the reporting requirements merits enforcement or when exigent circumstances or a good-faith failure to comply should be forgiven.

EPCRA is a complex statute with very technical definitions. Submittal of accurate Form R reports consistent with the section 313 statutory and regulatory specifications is often not a black and white issue. In many cases, the Form R report is the culmination of several time-consuming and deliberative determinations on whether a certain chemical mixture is subject to reporting or whether a particular chemical by-product of a manufacturing process qualifies as being "otherwise used" on-site, and thus potentially subject to reporting for releases above EPCRA's threshold quantities. Determinations of whether threshold quantities of toxic chemical releases are reached involve determining initially whether the toxic chemical qualifies as being "manufactured, processed, or otherwise used." EPCRA § 313(a), 42 U.S.C. § 11023(a). Each of these terms is further defined in 40 C.F.R. § 372.3 (1996). EPCRA also has a complex scheme for determining whether use of

chemical mixtures triggers the threshold reporting requirements. See 40 C.F.R. §§ 370.28 and 372.38 (1996). The Form R report must include estimates of releases of each covered chemical, even though there may be little or no measurement data to support those estimates.

An example of an area where *amici's* member companies must make technical interpretations is what constitutes a "waste stream" subject to Form R reporting. The Pollution Prevention Act of 1990 (PPA), 42 U.S.C. §§ 13101-09, added new reporting requirements for on-site process streams that are waste streams. Listed chemicals in the PPA waste streams, which include recycled streams and treated discharges, must be reported on Form Rs. EPA is in the process of developing a rule to define a "waste stream" and related concepts, but to date a rule has not been issued.²⁰ Nevertheless, companies must still make this determination. For example, a stream containing one or more reportable chemicals that is sent to a boiler or industrial furnace where it is used as a fuel would not appear to be a PPA waste stream if it displaces an available conventional fuel. But what constitutes an acceptable conventional fuel substitution? To date, EPA has not answered this question. Pulp mills generate spent pulping liquor as a residual of the wood pulping process, and generally these materials are recycled for chemical and energy recovery (burned as a fuel). In order to meet EPCRA's requirements, a mill may need to make its own conclusions on whether spent pulping liquor qualifies as a PPA waste stream that may need to be reported on the Form Rs.

Another complex area of EPCRA interpretation is what qualifies as a reportable "chemical mixture."

²⁰ The term "waste stream" is not defined by the PPA.

Frequently, the composition of mixtures may not be readily apparent, and a facility must determine whether the applicable thresholds under section 312 are met. Section 312 inventory form reporting is required for "hazardous chemicals" for which the maximum amount on-site at any one time exceeds specified quantities. Methanol is a hazardous chemical because of its ignitability. It is common practice for pulp and paper mills to have methanol present on-site as a trace contaminant of mixtures in certain process and waste streams. No reporting is required for a mixture that contains chemicals that would be considered "hazardous chemicals" if stored in their pure form, unless the concentration of the chemical in the mixture is more than 1 percent by weight (or more than 0.1 percent, if a carcinogen). 40 C.F.R. § 370.28 (1996). To prepare a correct inventory under section 312, the mill must generally assess all the chemicals contained in mixtures, know their concentration and whether or not they are considered carcinogens, and calculate how much of the chemical is included as a component of the mixture.²¹ There are often situations where the particular chemical mixture (or its components) may be required to be included in an EPCRA section 312 inventory form, but, depending on the characteristics of the mixture, the methanol contained in the mixture may not need to be reported separately on the section 312 report, *i.e.*, the methanol is less than the thresholds in 40 C.F.R. § 370.28 (1996). Difficult

²¹ As an alternative, EPA allows reporting on the entire mixture itself on the section 312 inventory form. 40 C.F.R. § 370.28(a)(2) (1996). However, for section 313 reporting requirements, the amount of a specific toxic chemical in a mixture that is released must be aggregated with other releases of the same chemical at the facility to determine if the reporting threshold is exceeded for that chemical. 40 C.F.R. § 372.30 (1996).

judgments often must be made before the EPCRA forms are filled out, and Congress thus rightly put the onus on EPA to enforce all EPCRA requirements and, where necessary, make the decision on whether a company is culpable for violating the Act.²²

It is appropriate for EPA, as the relevant government authority and the technical expert, to be making the difficult judgments about how the rules apply and whether a previously corrected error still warrants punitive action. For example, EPA has recognized that:

Generally, an EPA enforcement action may not be taken regarding changes to [Form R] reports that reflect improved information or improved procedures

²² The Seventh Circuit makes the assumption that inventory forms and Form R Reports can be thrown together with "minimal effort." *The Steel Company*, 90 F.3d at 1244, Pet. App. at A14. Again this assumption has little basis in practice. EPA has estimated that, in the first year alone, it takes approximately 50.5 hours of staff time to become familiar with the EPCRA rule requirements and determine compliance. Another 74 hours per report is needed to perform Form R calculations and complete the report, and maintain the relevant records. 61 Fed. Reg. 33,588, 33,617 (1996) (proposed rule to add seven new categories of facilities to the EPCRA reporting requirements). Since EPA requires a separate report for each chemical released above the applicable thresholds, many facilities are required to prepare multiple reports. While there is undoubtedly some time-saving economies of scale in preparing multiple reports, these are arduous reporting requirements that require more than a "minimal effort."

that were not available when the facility was completing its initial report.

56 Fed. Reg. 48,795, 48,798 (1991). EPA may also determine when only a Notice of Noncompliance is necessary or when an administrative or civil complaint should be filed. EPA's August 10, 1992 EPCRA § 313 Penalty Policy sets out a list of circumstances where inaccurately completed Form R reports would not automatically trigger a penalty, but only initially warrant a Notice of Noncompliance. EPCRA § 313 Penalty Policy 23 ELR at 35,523.²³ To put private citizens in EPA's role would not be filling the gaps in EPA enforcement, but would be "potentially intrusive." *Gwaltney*, 484 U.S. at 61.

CONCLUSION

Congress did accord a role for citizens in enforcing certain EPCRA requirements, and that role is a limited one. Nowhere in the statute or the legislative history are citizens granted the right to sue for wholly past violations that have been remedied. The Seventh Circuit's conclusion that citizen suits for wholly past violations do not disrupt EPCRA's enforcement balance between EPA and citizens does not reflect the practical realities of EPCRA compliance and enforcement. Moreover, there are over-riding

²³ Failure to respond to a Notice of Noncompliance would, under the EPCRA § 313 Penalty Policy, result in a penalty assessment. EPCRA § 313 Penalty Policy, 23 ELR at 35,524.

policy reasons for rejecting the Seventh Circuit's interpretation. For these reasons, the Seventh Circuit's decision should be reversed.

Respectfully submitted,

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May 2, 1997

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